No. 22-6054

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDRIC WARD
Plaintiff-Appellee,

v.

SHELBY COUNTY, TN
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee, Western Division (McCalla, J.)
Case No. 2:20-cv-2407

BRIEF OF RESERVE ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC

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May 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-6054 Case Name: Sedric Ward v. Shelby County, TN

Name of counsel: Scott A. Felder

Pursuant to 6th Cir. R. 26.1, Reserve Organization of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 2, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Reserve Organization of America ("ROA") is America's only exclusive advocate for the Reserve and National Guard—all ranks, all services. With a sole focus on support of the Reserve and National Guard, ROA promotes the interests of Reserve Component members, their families, and veterans of Reserve service. As part of this advocacy, ROA regularly files briefs in cases, like this one, that raise matters that implicate the interests of the Reserve Components. ROA urges the Court to grant Appellee's petition to preserve the procedural safeguards in the Uniformed Services and Reemployment Rights Act.

INTRODUCTION AND SUMMARY

Military reserve forces pre-date the founding of the Republic when citizen-soldier forces fought in the French and Indian War. State militias—later the National Guard—played a major role in the Revolutionary War. During the Civil War, state militias supplied 96 percent of the Union army. Hundreds of thousands of Guardsmen continued this tradition in World War I, representing the largest state contribution to overseas military operations during the 20th century. Nearly 300,000 Guardsmen served in World War II. More than 200,000 Reservists contributed to

[1] Counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *Amicus curiae* have requested leave of this Court to file this brief, and the parties consent to the motion.

the liberation of Kuwait in the Gulf War. After September 11, 2001, more than a million Reservists and National Guardsmen have answered the call to serve their nation, many several times over.

Today's Reserve Components constitute more than 40 percent of the total U.S. military force. Reservists hail from all walks of life. They are public high school teachers, doctors, lawyers, and police officers, united by their undying devotion to this nation and their commitment to service both in and out of uniform.

This case concerns the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and, specifically, the protections it provides our Armed Forces. Enacted after the Gulf War, USERRA was crafted to ease servicemembers' transition to civilian life and shield our citizen-warriors from workplace discrimination due to their military obligations.

USERRA is an integral part of Congress's choice to maintain the nation's Armed Forces with citizen-soldiers. Indeed, there are few national duties more critical than ensuring that "those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), will not face discrimination because of their service when they return to civilian employment.

The divided panel's interpretation diverges sharply from Congress's express aim in enacting USERRA, and risks gutting its purposes altogether. The panel

majority erred both in its analysis of waiver and in its misreading of Section 4302. *Amicus* submits this brief to clarify the proper standard for waiver under USERRA, and asks that the Court vindicate it and remove a considerable risk to our nation's ability to retain its vast and vital network of citizen-soldiers.

ARGUMENT

I. THE DIVIDED PANEL MISINTERPRETED USERRA'S WAIVER STANDARD.

A. The Panel Majority's Decision Contravened USERRA's Structure and Purpose.

The divided panel held that a Reservist could waive his USERRA rights merely by signing a general, nonspecific release provision. Slip Op. 4, ECF No. 49-2. But USERRA sets a higher bar.

"Identifying the interests protected by" USERRA "requires no guesswork, since the Act includes an 'unusual, and extraordinarily helpful,' detailed statement of the statute's purposes." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014). Congress's express purpose in enacting USERRA was to provide maximum protections to servicemembers. It sought "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. § 4301(a)(1). It promised "to minimize the disruption to the lives of" servicemembers. *Id.* § 4301(a)(2). And it vowed "to prohibit

discrimination against persons because of their service in the uniformed services." *Id.* § 4301(a)(3).

That express purpose is also embodied by the structure of the statute itself. For example, USERRA not only protects servicemembers, it affirmatively grants them "rights." *See, e.g.*, *id.* § 4312(a); *accord Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 447 (6th Cir. 2020) (recognizing that "rights-creating" language evinces congressional intent). To vindicate those rights, Congress equipped courts with sweeping equity powers and exempted servicemembers from all costs to bring an action. *See* 38 U.S.C. §§ 4323(e), (h). And Congress provided that USERRA "supersedes" any "contract" that "reduces, limits, or eliminates in any manner any right or benefit" provided under the statute, *id.* § 4302(b), except contracts that are "*more* beneficial" to the servicemember than the rights granted under USERRA, *id.* § 4302(a) (emphasis added). Thus, in an extraordinary move, Congress *preempted* common-law consideration principles by setting a higher standard that favors servicemembers in the bargaining process. *See* H.R. Rep. No. 103-65, pt. 1, at 20 (1993).[2] Far from permitting unrestrained freedom of contract,

[2] Separately, the majority holds that Section 4302's preemption of agreements that fail to provide "more benefits" is a subjective inquiry. *See* Slip Op. 6. That reading has no basis in the text. Nothing in Section 4302 suggests its sweeping language is subject to the beliefs of the servicemember. More telling, Section 4302 governs USERRA's interplay with conflicting federal and state law—not just private contracts. The Court's individualized, subjective standard is wholly unworkable when applied to public law and policy.

Congress erected guardrails to ensure servicemembers did not too easily squander their rights. Congress could not have been clearer in its intent to void any obstacles to its statutorily-conferred protections.

Congress's purpose is evident not only from the statute itself, but also from its "context, along with purpose and history." *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). President Clinton proclaimed that USERRA would "clarify and strengthen" the rights of servicemembers "to return to the civilian positions they held before going on active duty." Statement on Signing the Uniformed Services Employment and Reemployment Rights Act of 1994, 30 Weekly Comp. Pres. Doc. 2011 (Oct. 13, 1994) ("President's Signing Statement").

Consistent with this purpose, Congress explained that it only permits waiver of USERRA claims where the waiver is "*clear, convincing, specific, unequivocal*, and not under duress." H.R. Rep. No. 103-65, pt. 1, at 20 (emphasis added). In other words, Congress demanded that any waiver of USERRA rights would only be made through informed, deliberate, and voluntary negotiation.

And for good reason: employees possess limited bargaining power relative to their employers. *See Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995). Furthermore, employees are typically less informed on employment policies and

practice than their employers. Congress thus expected courts to diligently probe the circumstances under which a servicemember forfeits his USERRA claims.[3]

Congress did not intend for generic waiver provisions to thwart USERRA's purpose. Instead, if a waiver conflicts with the protective aims of the statute, USERRA requires invalidation of the waiver. *Leonard v. United Airlines*, 972 F.2d 155, 159-160 (7th Cir. 1992) (invalidating plaintiff's waiver of predecessor statute as violative of the statute's purpose "to minimize the disruption in individuals' lives resulting from the national need for military personnel"). Congress did not carefully craft a law that balanced servicemember and employee rights only to have employers alter this balance through boilerplate release agreements.

B. The Divided Panel Disregarded the Pro-Veteran Canon.

The divided panel also erred because it overlooked the pro-veteran canon in interpreting USERRA. The pro-veteran canon reflects Congress's deep "solicitude" for those servicemembers who sacrifice their civilian life to stand guard for our nation. *United States v. Oregon*, 366 U.S. 643, 647 (1961). It directs that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

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[3] Although the panel majority cites *Nicklin v. Henderson*, 352 F.3d 1077 (6th Cir. 2003), that decision does not limit the waiver analysis to the language of the release and instead mandates a comprehensive analysis of the "totality of the circumstances" before finding waiver. *Id.* at 1080.

Congress was ever-mindful of the canon when it enacted USERRA and left no doubt that it should control when interpreting the statute. Congress expected that servicemember reemployment rights would be "liberally construed," consistent with the "body of case law" that had developed around the canon. S. Rep. No. 103-158, at 40 (1993) (stressing Supreme Court caselaw favoring veterans "remain[s] in full force and effect"); H.R. Rep. No. 103-65, pt. 1, at 19 (same). Both the House and Senate cited *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946)—a Supreme Court decision applying the pro-veteran canon to USERRA's predecessor statute. S. Rep. No. 103-158 at 40; H.R. Rep. No. 103-65, pt. 1, at 20.

Since *Fishgold*, the Supreme Court has time and again invoked the pro-veteran canon to benefit servicemembers who would otherwise have no procedural recourse to exercise their rights under USERRA and other statutes. In *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), the Court explained that, in the case of ambiguity, it would interpret the Veteran's Reemployment Rights Act using "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 220 n.9. Two years later, in *Brown v. Gardner,* 513 U.S. 115 (1994), the Court suggested that its obligation to resolve "interpretive doubt . . . in the veteran's favor" would trump even agency deference. *Id.* at 117-118. Then, in *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011), the Court held that a 120-day deadline to file an appeal with the Court of

Appeals for Veterans Claims could not be jurisdictional "in light of" the pro-veteran canon. *Id.* at 441. Most recently, in *Rudisill v. McDonough*, 144 S. Ct. 945 (2024), the Court confirmed that if a statute is "ambiguous, the pro-veteran canon would favor" the servicemember. *Id.* at 958.

The majority departs from this longstanding approach. Rather than construing the statute in the servicemember's favor, the Court drops the waiver bar to the lowest rung.

C. The Divided Panel Failed to Consider the Analogous Waiver Standard Under the National Labor Relations Act.

When Congress enacts legislation within a general area of law, it is presumed to "adopt[] the law on that subject as it exists whenever a question under the statute arises." *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209-10 (2019). Courts routinely rely on this principle "to harmonize a statute with an external body of law that the statute refers to generally." *Id.* at 210. Here, Congress intended for USERRA to be linked to employment discrimination law, "so that the one develops in tandem with the other." *Id.*

As Judge Clay correctly recognized, "national labor policy casts a wary eye on claims of waiver of statutorily protected rights." Slip Op. 11 (Clay, J., dissenting). When analyzing waiver in other employment contexts, this Court requires that waiver of rights to a judicial forum be "clear and unmistakable." *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 653-54 (6th Cir. 2000). This "clear

and unmistakable" standard demands that, to affect a waiver of statutory rights, the "statute must specifically be mentioned" in the agreement. *Id.* at 654.

Despite the words being functionally identical, the divided panel interprets *Wysocki's* "clear and unambiguous" standard to be less exacting. As long as a release provision mentions "any and all claims," the majority will find waiver. Slip Op. 4. It is implausible that Congress intended that the waiver of a servicemember's statutorily-protected rights would face less scrutiny than other employment-connected waivers. The panel majority erred by failing even to consider this standard.

II. THE SCOPE OF WAIVER UNDER USERRA IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

A. The Divided Panel Disturbs the Rights and Expectations of Hundreds of Thousands of Servicemembers.

As of 2022, the United States retained over 750,000 Reserve and National Guard personnel. *See* Department of Defense, *2022 Demographics Report: Profile of the Military Community*, at 58 (2023). Often without warning, Reservists are subject to deployment. *See, e.g.*, 10 U.S.C. § 12301. The Reserve Components bear a significant burden in carrying out the nation's overseas operations and "provid[ing] critical combat power and support." *See* Col. (Ret.) Richard J. Dunn, *America's Reserve and National Guard Components: Key Contributors to U.S. Military Strength*, The Heritage Found. (Oct. 5, 2015).

When servicemembers return, not all civilian employers welcome them back. As the congressionally-chartered Commission on the National Guard and Reserves explained, "[a]s use of the reserve components has risen, reservists have become increasingly concerned that their service will harm their civilian employment." Commission on the National Guard and Reserves, Transforming the National Guard and Reserves into a 21st-Century Operational Force 257-58 (2008) (collecting data).

Compounding the issue, many National Guard and Reserve members do not understand their USERRA rights—assuming they have heard of USERRA at all. According to a 2010 Survey, only 47 percent of demobilized National Guard and Reserve members reported having a thorough understanding of the statute. *See* Department of Veterans Affairs, *National Survey of Veterans, Active Duty Service Members, Demobilized National Guard and Reserve Members, Family Members, and Surviving Spouses*, at 197-199 (2010).

In the face of information asymmetry in the workplace, the divided panel's decision leaves hundreds of thousands of servicemembers in the dark without protection from boilerplate waivers of their USERRA rights. Unchecked, many of these servicemembers will bargain away the benefits Congress expressly desired they receive.

The Court should reverse course.

B. The Divided Panel's Reading of USERRA Imposes Needless Confusion on Employers.

Employers will also be harmed by the Court's cramped interpretation of the statute. Upon enactment, President Clinton promised that USERRA would fix the "confusing and cumbersome patchwork" of amendments and "judicial constructions" that had "made the law difficult for employers to understand." *See* President's Signing Statement.

The majority upends this fix. Consider the hypothetical employer who wishes to enter into a release agreement with a covered employee. The Reservist employee purportedly need only agree to release "any and all claims whatsoever" to effectuate a waiver of his USERRA rights. Slip Op. 4. But under the Court's formulation, the employee—after a change of heart—can invalidate the agreement under Section 4302 and claim that he did not believe the benefits conferred were "more beneficial" than those provided by USERRA. *Id.* at 7. Indeed, to create a dispute of fact, the employee likely need only declare under oath that he did not believe the agreement was "more beneficial" than the rights provided under USERRA. *See Wysocki v. IBM Corp.*, 607 F.3d 1102 (6th Cir. 2010) (Martin, J., concurring). Thus, by shutting "the door to disputes later about whether an item was described clearly enough," Slip Op. 4, the majority opens the door to more fact-intensive disputes under Section 4302. The harms are predictable: employers will be less likely to provide severance packages to servicemembers and more likely to avoid hiring them altogether.

Requiring that any waiver be "specific," "convincing," "clear," and "unequivocal" incentivizes employers to engage in robust and open dialogue with servicemember employees about the consequences of any release. Further, should a servicemember still raise Section 4302 as a sword against his executed release, the record is more likely to include substantial evidence of his contemporaneous benefits calculus.

The divided panel's diminished waiver standard coupled with its misreading of Section 4302 frustrates employer expectations.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

/s/ *Scott A. Felder*

Dated: May 2, 2024

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. Rule 32(g)(1) and 6th Cir. R. 32(a), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. Rule 29(b)(4) because it contains 2,592 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(f) and 6th Cir. R. 32(b)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman, which is a proportionally spaced typeface.

Dated: May 2, 2024

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CERTIFICATE OF SERVICE

I certify that on May 2, 2024, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Sixth Circuit and served through CM/ECF upon all counsel of record in this case.

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